No. 87-640

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term 1987

E.C. ERNST, INC.,

and

TRAVELERS INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and JOHN PAUL MULCARE, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, despite Supreme Court precedent, Congressional intent, and the consistent administrative interpretation of the Longshoremen's and Harbor Workers' Compensation Act, the Court of Appeals was correct in determining that an individual who worked for six months in Saudi Arabia pursuant to a contract of employment with another company involved only in international construction was engaged in the same or similar employment as he was in Washington, DC. when he was injured while not under an employment contract so as to allow for the utilization of 33 U.S.C. § 910(a) as opposed to the utilization of 33 U.S.C. 33 §910(b) or (c) in the determination of average weekly wage when that individual did not perform exactly the same duties in Saudi Arabia as in Washington, D.C. and received benefits and bonuses for such contract work which could not be obtained in the domestic market.

2. Whether the decision of the Court of Appeals should be allowed to stand when it will result in an injustice to employers and workers who must underwrite a system which unjustly enriches the few, who, for whatever reason, may have worked overseas at rates of remuneration and benefits not related to the range, compensation and earning capacity of those possessing like skills in the trade or profession of workers employed in the United States.

3. Whether the decision of the Court of Appeals should be allowed to stand when it is in conflict with the decision of other circuits and when it will adversely control the decisions among the circuits.

4. Whether the decision of the Court of Appeals to include fringe benefits in the average weekly wage of an injured employee should be allowed to stand when it is contrary to a previous holding of the Supreme Court of the United States.

LIST OF PARTIES*

The parties in Case No. 86-1229 before the Court of Appeals for the District of Columbia were E.C. Ernst, Inc. and Travelers Insurance Company, as Petitioners; and Director, Office of Workers' Compensation Programs, United States Department of Labor and John Paul Mulcare, Jr., as Respondents.

The parties in Case No. 82-1164 before the United States Department of Labor, Benefits Review Board, were E.C. Ernst, Inc. and Travelers Insurance Company, as employer-carrier, petitioners; and John Paul Mulcare, Jr., as claimant.

The parties in Case No. 81-DCWC-76 before the Office of Administrative Law Judges were Paul Mulcare, Jr., as claimant; E.C. Ernst, Inc., as employer; Travelers Insurance Company, as carrier; and Director, Office of Workers' Compensation Programs, as party-in-interest.

* *See* Appendix E.

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TRAVELERS INSURANCE COMPANY,
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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and JOHN PAUL MULCARE, JR.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, E.C. Ernst & Inc. and Travelers Insurance Company, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 20, 1987, which applied Section 910(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the District of Columbia Workers' Compensation Act, 36 D.C. Code §501, *et*

seq., in determining an injured employee's average weekly wage, and which included in that average weekly wage various fringe benefits.

OPINION BELOW

The Decision and Order of the Administrative Law Judge (No. 81-DCWC-76) issued on June 2, 1982 is not reported but appears as Appendix A hereto. The Per Curiam Order of the Benefits Review Board (No. 82-1164), dated March 31, 1986, is reported at 18 B.R.B.S. 158 and appears as Appendix B hereto. The Per Curiam Opinion of the United States Court of Appeals for the District of Columbia (No. 86-1229) from which certiorari is sought, dated July 20, 1987, is not reported but appears as Appendix C hereto.

JURISDICTION

The Court of Appeals for the District of Columbia had jurisdiction pursuant to 33 U.S.C.A. §921(c), as extended by the District of Columbia Workers' Compensation Act, 36 D.C. Code §§501, *et seq.* (1973).

The Court of Appeals' decision in these cases was rendered on July 20, 1987 (App. A) and this Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES

The relevant statutory provisions are set forth as Appendix D hereto.

STATEMENT OF THE CASE

This case arises from the injury of the respondent, John Paul Mulcare, Jr., ("claimant" or "Mulcare") which arose out of and during the course of his employment with Petitioner

E.C. Ernst, Incorporated ("Employer" or "Ernst"), on April 7, 1979. The claimant sustained injuries to his head and back when he fell a distance of twelve to fifteen feet. The injury occurred in the District of Columbia. At the time of injury, the claimant was covered by the District of Columbia Workers' Compensation Act, 36 D.C. Code, §501 *et seq.* (1973), which in turn incorporated the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* (1976) ("LHWCA" or "Act"). Workers' compensation coverage was provided by Petitioner Travelers Insurance Company ("Insurer" or Travelers").

Prior to his injury, the claimant worked in the Washington, D.C. area as a journeyman electrician for Ernst for eight and a half years. Ernst is a company which was incorporated under the laws of the District of Columbia in 1930; it has always maintained its main offices in the District of Columbia and has been engaged in electrical contracting work of a domestic nature.

For the period beginning May 3, 1978 and ending May 30, 1978, and while employed by Ernst in the District of Columbia metropolitan area, claimant earned the union scale rate of $11.40 per hour. In April or May of 1978, he applied for, and did obtain, a position with E.C. Ernst International ("Ernst International"), a separate corporation and a subsidiary of Ernst. Ernst International performed work outside of the United States. Mulcare was prompted to take the job because of the lucrative nature of the contract, guaranteed hours, and fringe benefits inherent in the job. He performed this contract from June 22, 1978 to December of 1978, earning in excess of $53,000.00 for completing the contract.

For Ernst International, and while in Saudi Arabia, the claimant was employed as electrician supervisor, and was paid a base salary of $625.00 per week; guaranteed at least 48 hours of work per week; paid a $500.00 per month food allowance;

paid a 15% overseas incentive; and paid a 10% completion bonus. Mulcare was also paid for certain Saudi Arabian holidays such as Ramadan where he received pay for eight hours if he did not work and time and a half if he did work; Ramadan is a six- or fourteen-day holiday, according to the claimant's testimony. Fridays are considered days of rest in Saudi Arabia, and Mulcare received time and a half for working on Fridays. Finally, he was paid for two weeks for what was considered a "rest and relaxation" period. He was paid for two weeks off as a bonus for working in "undesirable areas." The total six-month contract paid Mulcare $53,077.47.

After completion of the contract in Saudi Arabia, Mulcare returned to the United States where he was rehired by Ernst as a journeyman electrician and resumed earning union scale wages in the Washington, D.C. metropolitan area. In this capacity, he suffered his injury of April 7, 1979.

Subsequent to the injury, Ernst and its workers' compensation insurer, Travelers paid the claimant compensation subject to Section 910(b) of the LHWCA, and based his wages on union scale wages of similarly situated journeymen electricians in the Washington, D.C. metropolitan area. The employer and insurer paid these wages from the time of the claimant's injuries until May 18, 1981, when he returned to work.

On March 19, 1981, a hearing was held before the Office of Administrative Law Judges pursuant to the LHWCA. Mulcare asserted that the average weekly wage used by employer and insurer to calculate the compensation rate was improper, as it failed to take into account the actual wages which he earned while working in Saudi Arabia. The Administrative Law Judge agreed and held that Section 910(a), and not Section 910(b), as asserted by the employer and insurer, was the proper section for computing the claimant's

benefits. Section 910(a) is utilized where the "employee shall have worked in the employment in which he was working at the time of injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. . ." Section 910(b) is utilized "if the injured employee shall not have worked in such employment during substantially the whole of such year. . ."

The Administrative Law Judge applied Section 910(a) on the basis that the nature of the claimant's employment during the year preceding the injury stayed essentially the same throughout, even though he had worked six months in Saudi Arabia as an electrician supervisor. Furthermore, the Administrative Law Judge held that the wages the claimant earned while abroad should be included even though they were in "an amount far greater than he could have hoped to earn for any comparable period of domestic employment." (App. C).

The employer and insurer appealed the matter to the Benefits Review Board, claiming that Section 910(a) was an improper measure of the claimant's average weekly wage, because his work in Saudi Arabia was of a different nature than that performed in the District of Columbia with regard to geographic location, skills utilized, and fringe benefits received. The employer and insurer asserted, in the alternative, that Section 910(c) should be used to calculate the claimant's average weekly wage. Section 910(c) is utilized "if either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied. . ." The employer and insurer asserted that Section 910(c) should be used as the claimant was earning union scale wages at the time of injury, and would continue to earn such wages upon returning to work with Ernst. They further contended that, by taking into account the claimant's

irregular wages, including fringe benefits earned while working in Saudi Arabia, Section 910(a) resulted in an unfair and unreasonable measurement of his true wage earning capacity.

The Board upheld the Administrative Law Judge's decision on the basis that the claimant performed essentially the same type of work, and that the additional benefits were just compensation for sacrifices made by Mulcare in leaving his family and home.

The employer and insurer appealed the Benefits Review Board's ruling to the United States Court of Appeals for the District of Columbia Circuit. Before the Court of Appeals, they further claimed that the inclusion of fringe benefits earned by Mulcare while in Saudi Arabia was in violation of the Supreme Court's ruling in *Morrison-Knudsen Constr. Co. v Director, OWCP,* 103 S.Ct. 2045 (1983). *Morrison-Knudsen, supra,* was decided in 1983, well after the instant case had been tried at the Administrative Law Judge level and appealed to the Benefits Review Board. Consequently, the parties did not raise the *Morrison-Knudsen* issue, and as well, the two administrative bodies could not have considered the same.

The District of Columbia Court of Appeals affirmed the Benefits Review Board's decision as to the applicability of Section 910(a) of the Act. It further held that the fringe benefits earned by Mulcare in his six-month contract abroad could be calculated as "wages" in determining his benefits.

These events bring this matter to its present posture.

ARGUMENT

At first blush, the decision below might appear to be an ordinary and narrow one of statutory construction in which the United States Court of Appeals for the District of Columbia simply adopted one of three alternative methods for determining a claimant's average weekly wage under Section 910 of the LHWCA which on its face may appear to be correct. The application of Section 910(a) of the Act in light of the facts of the case at hand, however, if not reversed, will have extraordinary and far-reaching consequences which will severely discriminate against employers of individuals who previously held employment outside of the United States.

The opinion below is incorrect because it directly contradicts Supreme Court precedent, Congressional intent, and the consistent administrative interpretation of the Act by the Department of Labor ever since the Act's passage in 1927. If left unchanged, employers would certainly think twice about hiring an employee who had served in a similar capacity outside the United States. Morever, the decision of the United States Court of Appeals for the District of Columbia sets precedent which may adversely control decisions among the Circuits when it is at odds to precedent established by the Supreme Court in *Morrison-Knudsen, supra.*

OVERVIEW

The Court's attention is invited to certain basic tenets of the LHWCA as they have bearing on the issues in the case at hand. Section 910 of the Act sets forth three alternative methods for determining the claimant's average weekly wage, which average is used to compute the claimant's rate of compensation for both temporary total disability and permanent partial disability.

Section 910(a) of the Act applies in cases in which the injured employee worked "substantially the whole of the year" prior to his injury, *in the employment in which he was injured.* The term "substantially the whole of the year" applies to the nature of the claimant's employment. *Brown v. General Dynamics Corp.,* 7 B.R.B.S. 561, at 566 (1978); *Eleazer v. General Dynamics Corp.,* 7 B.R.B.S. 75, at 79 (1977).

Section 910(b) of the Act is used when the claimant did not work for "substantially the whole of the year" prior to his injury in the employment in which he was injured. Under those circumstances, the average weekly wage is determined by using the wages of a "like employee of the same class who worked substantially the whole of the year preceding the injury in the same or similar employment and *in the same or neighboring place."* 33 U.S.C. §910(b) (Emphasis added).

Section 910(c) of the Act is applied when the claimant's employment has been discontinuous and intermittent *(Strand v. Hanson Seaway Services, Ltd.,* 614 F.2d 572, 575 (7th Cir, 1980); *Tri-State Terminals, Inc. v. Jesse,* 596 F.2d 752, 754 (7th Cir, 1979)), or when neither Section 910(a) nor Section 910(b) *(Palacios v. Campbell Industries,* 633 F.2d 840 (9th Cir. 1980)).

Sections 910(a), 910(b) and 910(c) furnish distinct methods for determining a claimant's average weekly wage. Subsection (a) computes average annual earnings based on the clai-

mant's actual employment history. Subsection (b) computes this figure using the hypothetical history of a typical worker engaged in similar employment *in the same general locality.* In the interest of reasonableness and fairness, subsection (c) offers a methods for determining the claimant's "annual earning capacity" based on such factors as the claimant's previous earnings, the earnings of other employees of the same or *most similar class* working in the same or *most similar* employment in the *same or neighboring locality,* and other employment of the claimant. *See Tri-State Terminals, supra,* at 756-59.

The intent and purpose of Section 910 of the Act is to allow for a determination of the claimant's wage earning capacity at the time of injury. *Orkney v. General Dynamics Corp.,* 8 B.R.B.S. 543 (1978); *Tri-State Terminals, Inc. v. Jesse, supra.* It is clear that the determination of a claimant's wage earning capacity is not intended to be automatic and rigidly arbitrary; rather the intent and purpose behind Section 910 of the Act is to set forth alternative methods to define earning capacity realistically in light of all factors known. The fact that Congress recognized a need for alternatives indicates an unwillingness to be bound to a strict mechanical method of determining wage earning capacity.

REASONS FOR GRANTING WRIT

I. A WRIT OF CERTIORARI SHOULD BE GRANTED AS THE DECISION BELOW WAS AN ERRONEOUS APPLICATION OF THE LAW

In the case at bar, the court improperly affirmed the Benefits Review Board's affirmation of the conclusion of the Administrative Law Judge, producing a shockingly inequitable result. The fact that Congress provided alternative methods for determining wage earning capacity indicates that mechanical formulas cannot be applied. The term "substantially," similar to the term "reasonably," implies flexibility. The very choice of such an elastic word indicates that the test is to be applied flexibly with the view of achieving the ultimate objective of fairly reflecting the claimant's earning capacity. Further, Congress' intent when it enacted Section 910 of the Act was to view wage earning capacity within the United States. This is illustrated by both Sections 910(b) and 910(c) where comparisons are to be made of like employees in not only the same or similar employment but *in the same or neighboring place.*

The Court below failed to recognize the distinction between employment held in the United States and employment held outside the United States. In the instant case, the claimant was earning District of Columbia union scale wages at the time of his injury on April 7, 1979. This rate was $11.70 per hour, or a base rate of $468.00 per week, which yields a compensation rate of $312.15. The claimant in fact received temporary total disability benefits at this rate. The fact that claimant had an intermittent job of six-months' duration in Saudi Arabia, the only such assignment held by claimant over an eight year period, should be viewed as atypical and should not be considered as properly reflective of this

claimant's average weekly wage and earning capacity. Theoretically, if a claimant were injured one week subsequent to a promotion, equity, justice and reasonableness would dictate that his wage earning capacity be judged on his new wages and not on previous wages which no longer bear any relation to claimant's situation. When a claimant took on a second job, his "two job" status, under the New York Workers' Compensation Act (the Act upon which the LHWCA is based) was held to be the proper basis for calculating his earnings. *Beach v. Launder Needs Co.*, 24 A.D.2d 789, 263 N.Y.S. 2d 757 (1965). When the reverse is true, the previous earnings, to the extent that claimant's remuneration can even be considered such, should not be considered in determining earning capacity, unless the current placement is temporary. This is not the case here.

Section 910(a) of the Act is applied in cases where the injured employee worked in the same employment in which he was working at the time of his injury for substantially the whole of the preceding year, 33 U.S.C. §910(a). The phrase "substantially the whole of the year," as stated earlier, refers to the nature of the claimant's employment. *Eleazer, supra; Brown, supra.* While a substantial part of the year may comprise work by the claimant for two separate employers where the skills used in the two jobs are highly comparable *(see Hole v. Miami Shipyards Corp.*, 12 B.R.B.S. 38, 43 (1980), *rev'd on other grounds,* 640 F.2d 758 (5th Cir. 1981)), employment outside the United States, regardless of the job description, cannot be said to be the same or even substantially the same as employment within the United States. It is evident that the work performed by the claimant in Saudi Arabia was substantially different in nature than that performed in Washington, D.C. This difference is primarily attributed to the location and attendant risks of that location, rather than the specific day-to-day duties. The claimant, during his tenure

in Saudi Arabia, was compensated for expenses which were created solely by the location of the employment and which ceased with the termination of the employment in Saudi Arabia. Consequently, such compensation should not be considered in the average weekly wage.

Furthermore, the fact that additional compensation is required to induce employees to work in Saudi Arabia, which compensation is not necessary to obtain workers in the United States, indicates that the employment is substantially different; if it were not, the additional compensation would be unnecessary. It is undisputed that no contract can be obtained in the Washington, Metropolitan Area or throughout the United States which would provide for compensation similar to that provided by claimant's employer in Saudi Arabia and, consequently, such work cannot be construed to be substantially the same as any work in the District of Columbia or the United States.

Section 910(a) of the Act is applied in cases when an injured employee worked in the employment in which he was working at the time of his injury, for substantially the whole of the year prior to his injury. Claimant in this case was not working in the employment in which he was working at the time of his injury for substantially the whole of the year prior to his injury, having spent one half of the year in Saudi Arabia and one half of the year in Washington, D.C. This section was therefore inapplicable to a determination of claimant's average weekly wage. Further, Section 910(a) is to be applied only when the employment in which the claimant is injured is of a permanent and steady nature. *O'Hearne v. Maryland Casualty Company,* 177 F.2d 979 (4th Cir. 1949). The claimant in the instant case did not work on a permanent and steady basis in the employment in which he was engaged at the time of his injury. Likewise, the claimant's work in Saudi Arabia was neither permanent nor steady.

Section 910(b) of the Act, on the other hand, is to be applied when the claimant has not worked in the type of work he was working at the time of his injury for substantially the whole of the year prior to that injury. This section requires that the average weekly wage be based on wages of an employee of the same *class* who worked substantially the whole year preceding the injury, in the same or similar employment, *in the same or neighboring place.* Consequently, Section 910(b) most clearly reflects the object and intent of Congress when meeting circumstances such as are present in the instant case; it requires that one draw parallels with individuals working in the same locality in the same employment, looking to similarly situated employees to determine wage earning capacity. Allowing evidence of wages from foreign work results in aberrations of the true wage earning capacity of the claimant and, consequently, an injustice to the employer, and, on a broader scale, other employers and workers who must underwrite a system which unjustly enriches the few, who, for whatever reason, may have worked overseas at rates of remuneration not related to the range of compensation and earning capacity of those possessing like skills in the trade or profession of workers employed in the United States. The true measure of this claimant's wage earning capacity should be made pursuant to Section 910(b) which takes into consideration the hours, wages and type of work available to the claimant in the Washington, D.C. metropolitan area. See *Hatchet v. Duncanson Harrelson Company,* 8.B.R.B.S. 173 (1978).

Section 910(c) of the Act, in the alternative, is to be used when claimant's employment is part time, intermittent, or discontinuous; *Strand v. Hansen Seaway Ltd.,* 614 F.2d 572 (1979); or when application of mathematical formulas provided in Section 910(a) and (b) would be unreasonable or unfair; *Palacios, supra.*

Numerous court decisions have determined that the proper method of applying Section 910 is to view all sections in their entirety and their true meaning should be ascertained by giving due weight and considering all parts of the section as a whole. *Andrew F. Mahoney v. Marshall,* 46 F. Supp. 539 D. Wash. (1931), *aff'd* 56 F.2d 74 (9th Cir. 1932). As stated in *O-Hearne, supra* at 981, 982, the operation of Section 910 is as follows:

> The reasoning underlying the [A] ct is that compensation is to be based upon the employee's earning capacity in the employment in which he was engaged at the time of the injury. If he has worked in the employment for a year preceding the injury, his own earnings furnish the basis of compensation under Section (a). If he has worked in the employment less than a year, compensation is computed under subsection (b) and is based on the average earnings over the preceding year of an employee of the same class working in such employment. Where neither (a) nor (b) can reasonably nor fairly be applied because of the nature of the employment, as where it is intermittent or discontinuous in nature, then the compensation is to be determined under Section (c) on the basis of annual earning capacity of the employee.
>
> * * *
>
> The reason that the actual earnings of the employee are taken into account under (c) but not under (a) and (b) is that. . .compensation is based upon the earning capacity which is impaired or destroyed by the injury; and where the injury occurs in employment of a permanent and steady character, compensation based upon the earnings of that employee fairly compensate for the loss of earning capacity that has been sustained. Where the employment is discontinuous or irregular, however, compensation cannot be fairly based upon such earnings. To treat

> the irregular wage as though it were regular, would be unfair to the employer and to treat the earnings from the employment as the sole earnings of the employee would be unfair to him, since the injury he sustained in the service of his employer has impaired his earning capacity not only in that service but also in other work in which he has been engaged.

The decisions below in the instant case have awarded the claimant an average weekly wage based upon the wholly speculative position of the claimant that he would return to Saudi Arabia on a permanent or "regularly intermittent" basis. While the claimant may have desired to return to Saudi Arabia, he did not return any applications to prospective employers who might have so accommodated him. While numerous employers may hire American workers overseas, this does not lead to the conclusion that anyone desiring to be employed overseas will be hired by a corporation doing business abroad; consequently, an assertion that the claimant would have found other work overseas was too speculative to have been considered by the court, even if benefits under the LHWCA were available to American workers regularly employed overseas.

The claimant's extremely high compensation (including fringe benefits, *i.e.*, $500.00 per month food allowance, 15% overseas incentive, 10% completion bonus, holiday and vacation pay) in the year preceding his injury were an aberration, and not reflective of his actual wage earning capacity in the Washington, D.C. metropolitan area. Section 910(a) of the Act is inapplicable to the actual employment of this claimant. In the case of *Tri-State Terminal v. Jesse, supra* at 758, the court stated that the intent behind Section 910 of the Act is to get a "true, fair and realistic picture of the average earning capacity of the individual involved." Further, in *Strand*

v. Hanson Seaway Services Ltd, supra at 576, citing *Mahoney, supra,* the court held that a benefits determination based on "a mere theoretical earning capacity, with no regard for the actual facts of the case is unreasonable." And, further, where such application would result in arbitrarily awarding a claimant compensation in excess of what he would be able to earn if at work is not justifiable within the intent of the statute. By applying Section 910(a) in the instant case, the average weekly wage of the claimant is vastly distorted. In *Johnson v. Britton,* 290 F.2d 355 (D.C. Cir) *cert denied,* 368 U.S. 859 (1961), the court held that it would be inequitable to base a claimant's benefits on a theoretical wage earning capacity where the formula would result in highly distorted earning figures. *Id.* at 359. The court further stated that "to otherwise hold would be an unfair and inequitable result." *Id.* at 357. The Writ of Certiorari should be granted as it is clear that the court below has misapplied a Federal statute. It is an arbitrary and capricious interpretion of the Act.

II. WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICT AMONG THE CIRCUITS AS TO THE APPLICATION OF SECTION 910 OF THE LHWCA

The decision of the Court of Appeals for the District of Columbia in this case is inconsistent with holdings of the United States Courts of Appeals for the 4th Circuit, 5th Circuit, 7th Circuit and 9th Circuit. The Court, in *Newkirk Shipbuilding & Repair, Inc. v Roundtree,* 698 F.2d 743 (5th Cir. 1983), held that a self-employed welder had a complete change in the nature of his employment when he voluntarily relinquished his self-employment as an independent contractor and accepted an hourly job as a welder in a shipyard. The court placed heavy emphasis on the fact that, as an independent contractor, the claimant was not engaged in "covered employment" under the LHWCA and, consequently, had no

employer prior to his employment with the shipyard. As a result, the court upheld the Administrative Law Judge and the Benefits Review Board's decision that Section 910(a) of the Act did not apply to claimant. The same can be said for the case at hand, in that a Workers' Compensation claim could not properly have been brought within the United States under this statute as a result of an injury sustained while employed in Saudi Arabia. Consequently, claimant in the case at hand would not be entitled to have his average weekly wage based upon Section 910(a) in that he did not work substantially the whole of the year in the same or similar employment.

Further, the Court of Appeals for the 9th Circuit, in *Andrew F. Mahoney Company v. Marshal, supra,* sanctioned the use of Section 910(c) recognizing that use of Section 910(b) would provide greater compensation to the claimant than he earned through his prior intermittent employment. Clearly the court was seeking to prevent unjust enrichment. In the case at hand, use of Section 910(a) would produce that same unjust enrichment that the court sought to avoid in *Mahoney.* The 4th Circuit, in *O'Hearne v. Maryland Casualty Company, supra,* recognized the potential for unjust enrichment when applying either Section 910(a) or Section (b) and held that when neither section can reasonably or thoroughly be applied because of the nature of the employment, compensation is to be determined under Section 910(c). The 7th Circuit is in accord with the 4th, 5th and 9th Circuits as illustrated by its decision in *Tri-State Terminals, Inc. v. Jesse, supra,* wherein the court found the prime objective of Section 910 of the Act was to ensure that compensation awards would be based on an accurate assessment of the claimant's earnings capacity. The court held that "earning capacity" means the amount of earnings claimant would have the potential and opportunity to earn absent injury. The court places heavy emphasis on providing a true, fair and realistic picture of the average earning capacity of the individuals involved.

Furthermore, the decision of the United States Court of Appeals for the District of Columbia in the instant case is at variance with its own prior decisions. In *Johnson v. Britton, supra,* 358, citing *Mahoney, supra,* the Court stated

> It could not have been the purpose or intent of the Congress, in view of the construction placed upon the [A]ct by the court of states from which the [A]ct in issue was largely taken, and "due process" and "equal protection" clauses of the Constitution and the provisions of Section 10, subdivisions (a), (b) and (c) 33 U.S.C.A. §910(a)-(c), to apply the "300 Rule" to this claimant upon the record in this case, when the average earning capacity is known, no interruptions of earnings being occasioned by illness or injury. These subdivisions are merely rules by which the annual earning capacity may be gauged when actual earnings in normal conditions cannot be computed.

The Court further stated:

> To arrive at its proper meaning and application Section 10 (33 U.S.C.A. §910) must be taken in its entirety and its true meaning be ascertained by giving due weight and consideration to all parts of the section in the light of the general aims and objects of the statute taken as a whole. The section does not provide that every case must be measured by subdivisions (a) or (b) if it be possible to force the transaction into the formulae which those subdivisions prescribe and that subdivision (c) is to be applied only to cases which cannot be measured by (a) or (b). On the contrary, it provides that subdivision (c) is to be employed whenever (a) and (b) cannot reasonably and thoroughly be applied."

Id. at 358, 359.

The District of Columbia Circuit's decision in the present case is inconsistent with the other Circuits' rulings on the determination of benefits under Section 910 of the Act. The

4th Circuit has held that it is unfair to treat an irregular wage as regular when computing benefits. The 7th Circuit as well as the 9th Circuit have held that actual earnings as well as potential earnings should be considered in calculating benefits so as to arrive at wages which more realistically reflect the claimant's loss of earning capacity. Previous decisions of the District of Columbia Circuit have ruled that wages should not be based on highly distorted earning figures. The Writ of Certiorari should be granted as it is clear that the determination of the average weekly wage in the case at bar is based on a computation of irregular, distorted earning figures which fail to reflect realistically the claimant's loss of earning capacity and create an unfair and excessive rate of compensation which is inconsistent with the rulings of the other Circuit.

That this is true in the instant case is brought even more to the fore when one considers that, should the claimant return to employment earning $468.00 per week in the Washington, D.C. metropolitan area, he, in fact, would have no loss of wages or wage earning capacity. However, by making the determination of including his wages from Saudi Arabia, the employer and insurer are faced with a situation that, should he never return to Saudi Arabia, his wage earning capacity would appear severely impaired when, in fact, he would be earning the same as any other individual so employed in this geographical location. Thus, Mulcare could, in essence, be the sole determiner of his loss of wages - not based on physical or earning-impairment, but based on a desire to reside and work in a particular location.

III. WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE A MISINTERPRETATION OF THE "WAGE" DEFINITION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT BY THE DISTRICT OF COLUMBIA COURT OF APPEALS, IN VIOLATION OF CONGRESSIONAL INTENT, AND MORRISON-KNUDSEN V. DIRECTOR, OWCP

The Court of Appeals for the District of Columbia Circuit improperly concluded that claimant's fringe benefits were includible in his average weekly wage. The term "wages," by definition, excludes fringe benefits. In *Morrison-Knudsen Constr. Co., et al. v. Director, Office of Workers' Compensation Programs,* 103 S.Ct. 2045, *rev'd Hilyer v. Morrison-Knudsen Constr. Co.,* 670 F.2d 208 (D.C. Cir. 1981), this Court ruled that fringe benefits, particularly employer contributions to health and welfare funds, were not includible in the average weekly wage pursuant to Section 902(13) of the pre-1984 Amendment Act, the predecessor to the current legislation. The employer and insurer read *Morrison-Knudsen* as disallowing *all* fringe benefits from inclusion in the average weekly wage, based on specific examples cited by the Court, as well as statements made *in dictum.*

In *Morrison-Knudsen,* this Court considered whether an employer's contributions to a union trust fund for health and welfare pensions, and training, were "wages" under Section 902(13). It concluded that those contributions were not "the money rate at which the service rendered is recompensed" and that the contributions were not the "reasonable value of board, rent, housing, lodging or similar advantage. . ." The contributions, therefore, did not fall within the meaning of "wages" as they were too speculative to be given a fair market value. After considering the legislative history of the Act, the Court also concluded that Congress had intentionally excluded fringe benefits from the wage equation. Although the facts of that case involved employer contributions to health and

welfare funds, the Court pointed to an array of benefits, not specifically identified by Section 902(13), which should be excluded from the wage definition.[1]

In its analysis, the Court noted that the employer contributions bore no relationship to the actual services rendered by the claimant, and that they were not a true measure of the benefits to which the employee or his dependents might be entitled. Great pains were taken to emphasize the fact that the surviving dependents could not take the sixty-eight cents ($.68) per hour which the claimant earned by way of employee contributions to premiums, and purchase identical or similar benefits on the open market. *Id.* at 2049. Further noted was the fact that the benefit to either the claimant or his dependents was speculative, as that benefit was contingent upon the happening of a specific event, in that case, the death of the employee. Had the employee quit his job, been fired, or had he retired, the specific benefit to which the surviving dependents would have been entitled because of the employee's death would never have vested. *Id.* at 2049.

In looking at the legislative history of the Longshoremen's and Harbor Workers' Compensation Act, specifically Section 902(13), this Court noted that the Act had gone through ten revisions, and that the definitional section, Section 902(13),

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[1]At note 11, p. 2051, Chief Justice Burger stated:

> Mrs. Hilyer asked only for the inclusion in wages of Morrison-Knudsen's contributions to union trust funds. Her argument appears to imply, however, that every benefit of her husband's employment should be evaluated to determine his wages. This would seem to require the Secretary of Labor to include in his determination of the national average weekly wage such diverse elements as employer contributions to social security, administrative costs of maintaining savings and thrift plans, and the costs of Christmas parties, company outings, or gold watches.

had not been changed.[2] The Court went on to state that at the time the Act was first implemented in 1927, fringe benefits, for the most part, were non-existent, and could not conceivably have added to the employee's average weekly wage. Consequently, the definition of "wages," as excluding fringe benefits, has remained static for over fifty years. The Court cautioned that it would not judicially change the definition of "wage," as that task was entirely up to Congress. Congress has now explicity moved to exclude fringe benefits from consideration in determining the average weekly wage, by passing the 1984 amendments to the Longshore Act.[3]

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[2] As stated in *Morrison-Knudsen,* Congress has acted to specifically include fringe benefits in *other* statutory schemes. The Davis-Bacon Act, 40 U.S.C. §2760, an act implemented to protect employees of general contractors which have been granted federal contracts, defines "wages" as including:

> (B) the rate of costs to the contractor. . . which may be reasonably anticipated in providing benefits to laborers. . . for medical or hospital care, pensions or retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurances, or accident insurance, for *vacation* and *holiday pay,* for defraying costs of apprenticeship or other similar programs, *or for other bona fide fringe benefits. . .*" (Emphasis added).

Similar language can be found in 38 U.S.C. §4114, 45 U.S.C. §836, and other statutory schemes. Congress could have used this or similar language in Section 902(13) of the act to include fringe benefits, had it been so inclined; instead, it chose not to.

[3] Section 902(13) now reads:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholdings of tax under Subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). *The term wages does not include fringe benefits, including (but not limited to)*

The Supreme Court decision in *Morrison-Knudsen* impacts heavily on the facts of the instant case given the numerous fringe benefits which the Administrative Law Judge calculated into the claimant's average weekly wage. The $53,077.47 which claimant made during his six (6) month tenure in Saudi Arabia was comprised mostly of fringe benefits which were peculiar to the overseas nature of his work. His base pay was $625.00 per week; he was given a $500.00 per month food allowance; paid a 15% overseas incentive; and paid a 10% completion bonus. He was also paid for certain Saudi Arabian holidays such as Ramadan where he received pay for eight hours if he did not work, and triple time if he did work. He received time and a half for working on Fridays, which are considered days of rest in that country. Finally, he was paid for two weeks while off from work as a bonus for working in "undesirable areas."

For purposes of the payment of temporary total disability (a weekly benefit in the amount of 66⅔% of the average weekly wage), the inclusion of these fringe benefits into claimant's average weekly wage is of no consequence. For the sake of argument, if one were to assume that his base pay was $625.00 per week, he would be entitled only to the maximum compensation rate at the time of the injury, or $396.78 (66⅔% x $625.00 = $416.66, which is far above the maximum compensation rate). However, the inclusion of these fringe benefits into claimant's average weekly wage impacts

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employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement." (Emphasis added).

This amendment was the direct result of the holding in *Morrison-Knudsen*. 2 A. Larson, *Larson's Workmen's Compensation Law*, §60.12(b) (1986).

heavily upon his entitlement to permanent partial disability benefits based on wage loss.

Assuming that claimant were to return to work at an average weekly wage of $300.00, and had a pre-injury average weekly wage of $625.00, and assuming that the $300.00 was representative of his earning capacity, claimant would be entitled to receive two-thirds of the difference between his pre- and post-injury average weekly wages. Under this scenario, Mulcare would be entitled to $216.66 per week in permanent partial disability benefits under Section 908(c)(21) of the Act. Assuming that the claimant were re-employed at a salary of $300.00 per week, and assuming this time that his pre-injury average weekly wage was $1,097.54 as alleged, claimant would be entitled to $396.78 per week in permanent partial disability benefits. ($1,097.54 - $300.00 = $797.54 x ⅔ = $511.64). Under the first scenario, the employer would be obligated to pay $216.66 per week in compensation benefits; under the second, the employer would be obligated to pay the maximum compensation rate of $396.78.

The claimant has argued that "permanent partial disability is not an issue in this case in its present posture. . ." and, thus, the employer's and insurer's argument as to fringe benefits is not ripe for consideration. It is obvious that the Court's determination on the issue of fringe benefits, one way or the other, will have profound consequences on the employer's and insurer's liability once the claimant becomes entitled to permanent partial disability benefits. The determination of the claimant's average weekly wage as a product of this litigation is final. That wage will apply to claimant's current claim for temporary total disability benefits and will apply to any future claim for permanent partial disability benefits once the claimant becomes entitled. Once the wage determination is made here, the employer and insurer will be forever barred from challenging that wage. The employer

and insurer would have waived their right to raise this issue, had it not been raised and addressed in the Court of Appeals; consequently, the issue is ripe, and a denial of the right to raise it would be a forfeiture without due process of law.

The fringe benefits available to the claimant in the instant case are no less speculative than the employer contributions to pension plans in *Morrison-Knudsen.* The fringe benefits contained in Mulcare's contract of hire were merely incentives to perform in a foreign and tension-filled region, and bore no relationship to the actual work performed. As such, no fair market value can be affixed to these nebulous incentives on the open market. In addition, neither the claimant (had he remained in the Washington, D.C. metropolitan area), nor any other journeyman electrician in the Washington, D.C. area could have received such lucrative benefits. The claimant so testified, and the Court of Appeals so found. (App. A).

It is clear that several of the fringe benefits were *contingent* in nature. The 10% completion bonus was contingent upon the completion of the work. Had the job not been completed for whatever reason, or had the claimant been incapable of performing through the completion of the contract, the benefit would not have vested. As such, it is speculative.

As in *Morrison-Knudsen,* had the claimant quit his job, been fired, or had he retired for whatever reason, the specific benefits referred to would not have fully vested. Given all of the possible contingencies which might cause a failure of these benefits to fully vest, and given the fact that the benefits bore no relationship to actual work performed, they cannot be given a fair market value. As such, they should be disallowed as inclusions in claimant's average weekly wage.

The case of *Hilyer v. Morrison-Knudsen Constr. Co.,* 670 F.2d 208 (D.C. Cir. 1981), which was reversed by the Supreme Court's decision in *Morrison-Knudsen* has been harshly criticized by Professor Larson, in his treatise, *Larson's*

Workmen's Compensation Law. That criticism has been leveled at the expansive and radical reading which the D.C. Circuit Court of Appeals gave to Section 902(13). The Circuit Court's decision to include in the average weekly wage the employer's contributions to the union trust fund for health and welfare pensions, and similar contributions to other insurance-like programs, has been deemed "seriously wrong" and "sinisterly dangerous because it has just enough surface plausibility to tempt other to follow its lead. . ."[4] Professor Larson's concern was that such a decision, if left unchecked, would have the effect of allowing all forms of fringe benefits into the wage equation, over and above the "reasonable value of board, rent, housing or similar advantage. . ." as called for by the Act.

Professor Larson's criticism must necessarily be echoed as it concerns the fringe benefits which have been allowed into the average weekly wage in the instant case. The D.C. Court of Appeals for the District of Columbia Circuit, in a *per curiam* opinion, has now again misinterpreted Section 902(13)

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[4] Professor Larson states, 2 A, *Larson's Workmen's Compensation Law,* §60.12(b):

> Although the Supreme Court's decision *(Morrison-Knudsen)* lays this issue (of fringe benefits) to rest for purposes of the Longshoremen's and D.C. Acts, similar questions arise from time to time under state acts, and accordingly, it may be of some value to retain here the Treatise's emphatic criticism of the D.C. Circuit *Hilyer* decision. . . The Circuit Court's decision is seriously wrong and is sinisterly dangerous because it has just enough surface plausibility to tempt others to follow its lead — which, in view of the growing prominence of assorted fringe benefits, could result in judicial legislating of a sudden large-scale increase in compensation cost never contemplated by employers, carriers, legislatures or anyone else. The central fallacy in the Court's opinion is that it attempts to interpret "wages" in the abstract. It declares the sole issue to be whether the fringe benefit is a "value" that is "readily identifiable and calculable. . ."

in such a way as to allow all manner of fringe benefits into the average weekly wage equation so long as they are not employer contributions to benefit plans. This expansive reading was contrary to the Supreme Court's ruling in *Morrison-Knudsen* and Congressional intent, and requires plenary review in order to have Supreme Court precedent properly applied.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(b)
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1229 **September Term, 1986**

E.C. Ernst, Inc., et al.,

Petitioners

v.

John Paul Mulcare, Jr., and
Director, Office of Workers' Compensation
Programs, United States Department of Labor,

Respondents

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Wald, Chief Judge
Mikva and Buckley, Circuit Judges

JUDGMENT

This case was considered on the record of proceedings before the Benefits Review Board and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 13(d). For the reasons set forth in the accompanying memorandum, it is

ORDERED and **ADJUDGED** by the court that the petition for review of the Board's order dated March 31, 1986 be dismissed. It is

FURTHER ORDERED by the court that the Motion for Summary Affirmance be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14.

Per Curiam

86-1229 – *E.C. Ernst, Inc. v. Director, Office Workers' Compensation Programs*

MEMORANDUM

E.C. Ernst, Inc. ("Ernst") petitions for the review of an order of the Benefits Review Board awarding respondent John Paul Mulcare, Jr. the maximum weekly compensation for a period of temporary total disability experienced in 1979-81. Petitioner's primary challenge is to the method used to determine respondent's average weekly wage under Section 10 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982), as extended by the District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36-501 (1973). Petitioner contends that the Board erred in upholding the decision of the Administrative Law Judge to apply the method prescribed by Section 10(a) of the Act to determine average weekly wage. Instead, petitioner argues, Section 10(b) provides the correct formula for this case.

The crux of petitioner's argument is that respondent had not worked in the employment in which he was working at the time of his injury for substantially the whole of the preceding year. In particular, petitioner argues that respondent's employment in Saudi Arabia for a six month period during that year was of a different nature than his employment in the United States during the balance of that year. There is substantial evidence in the record, however, to support the conclusion that respondent worked for substantially the whole year preceding his injury, *see* Appendix at 199, 230,[1] and that the nature of respond-

[1] The Board held that Mulcare worked for 279 days during the year in question and that a 300-day multiplier should be used to determine average annual earnings, from which an average weekly wage would be calculated. Petitioner challenges both conclusions. For our pur-

nent's employment did not change materially during the course of this year. *See Appendix* at 53 (respondent states that he was performing the same type of work in Saudi Arabia as he had done as an electrician in the United States); *id.* at 64 (respondent states that he was a foreman or subforeman in the United States for three to four years); *id.* at 105 (respondent states that while in Saudi Arabia he worked as an electrician, foreman and supervisor); *id.* at 217, 263 (Mulcare hired to work in Saudi Arabia as an "electrician," although during his employment he "has served in the capacity as Electrical supervisor"); *cf. id.* at 105 (before respondent went to Saudi Arabia he "was just a journeyman electrician").

The fact that Mulcare worked for a different employer while in Saudi Arabia (E.C. Ernst International Corp.) does not mean the method prescribed by section 10(a) of the Act may not be used. *See* 33 U.S.C. § 910(a) ("whether for the same or another employer"); *see also Waters v. Farmers Export Co.*, 14 Ben. Rev. Bd. Serv. (MB) 102, 107 (June 12, 1981), *aff'd*, 710 F.2d 836 (5th Cir. 1983); *Hole v. Miami Shipyards Corp.*, 12 Ben. Rev. Bd. Serv. (MB) 38, 43 (March 10, 1980), *rev'd on other grounds*, 640 F.2d 769 (5th Cir. 1981). Nor does the Act bar use of the section 10(a) method because Mulcare worked for a portion of the relevant time period outside the United States. *Compare* 33 U.S.C. § 910(a) (use of formula not limited to

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poses here it is necessary only to rule on the question of whether Mulcare worked for substantially the whole of the year, which we do in the affirmative. While it appears that Mulcare may have actually worked only 263 days during that year, *see* Appendix at 199, 200, and even assuming a 260-day, and not a 300-day multiplier should be used, the resulting average weekly wage, multiplied by 2/3 would still be greatly in excess of the maximum weekly compensation allowance of $396.78.

when claimant works for substantially the whole year in one location) *with* § 910(b) (average wage determined by reference to wages of employees doing similar work "in the same or a neighboring place") *and* § 910(c) (same). In addition, although the wages received by respondent for his work in Saudi Arabia were greatly in excess of those he received for the work he performed in the United States, there is substantial evidence in the record to support the conclusion that this extra pay was to compensate Mulcare for the hardship and inconvenience of working in Saudi Arabia, and not because the overseas job amounted to a promotion or because it required additional skills or training. *See* Appendix at 154 (Ernst general counsel states that higher wages in Saudi Arabia compensate for inconvenience of separation from family and being in a foreign country); *see also id.* at 55, 69, 76 (respondent's belief that higher pay and benefits used as an inducement to obtain employees for work in Saudi Arabia).

Because respondent worked for "substantially the whole year" in his employment as an electrician, the formula prescribed in section 10(b) does not apply to this case. Although petitioner does not specifically argue the point, it also does not appear that the section 10(c) formula should apply. Because of Mulcare's actual work history during the year preceding his injury, as well as his employment intentions for the future, the section 10(a) formula can be reasonably applied to determine the rate of compensation to which he is entitled.

Finally, petitioner argues that all amounts paid to Mulcare by Ernst, International above the $650/week base salary should not be used in calculating Mulcare's average weekly wage. The other elements of Mulcare's compensa-

tion, however, were paid directly to him as consideration for the work he performed and the sacrifice he made in taking employment in Saudi Araia. Payments Mulcare received for overtime work, as an overseas adjustment, as a completion bonus, for unused vacation and "rest and relaxation" time, and as a food allowance, moreover, all amounted to "real economic gain" to Mulcare. 2 A. Larson, Larson's Workmen's Compensation Law § 60.12(a) (1986); *cf. Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 630 (1983) (excluding from wage-basis calculation sums paid by the employer not to employee, but to employee's Health and Welfare Fund, Pension and Disability Fund, and Training Fund).

In sum, the order of the Benefits Review Board in upholding the computation of respondent's compensation payments using the method prescribed in 33 U.S.C. § 910(a) is supported by substantial evidence and in accordance with applicable law. *See O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.,* 380 U.S. 359, 362 (1965). Accordingly, the petition for review is dismissed.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 20 1987
GEORGE A. FISHER
Clerk

APPENDIX B

U.S. Department of Labor
Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036
BRB No. 82-1164

JOHN PAUL MULCARE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
E.C. ERNST, INCORPORATED	)	
	)	
and		
	)	
THE TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	**DECISION and ORDER**

Appeal of the Decision and Order of Julius A. Johnson, Administrative Law Judge, United States Department of Labor.

Timothy F.X. Cleary (Ashcraft & Gerel), Washington, D.C., for claimant.

Jeffrey W. Ochsman (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for employer/carrier.

Before: DOLDER and McGRANERY, Administrative Appeals Judges, and WHITE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5)(1986).

PER CURIAM:

Employer appeals the Decision and Order (81-DCWC-76) of Adminisrative Law Judge Julius A. Johnson awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502, (the Act).

The sole issue on appeal is the appropriate method of computing claimant's average weekly wage under Section 10 of the Act, 33 U.S.C. §910.[1] The administrative law judge calculated claimant's average weekly wage under Section 10(a), taking into account a six-month period of employment in Saudi Arabia during which claimant, an electrician, earned considerably more than he would have earned had he been working for employer in the District of Columbia at the union rate of pay. Employer contends the administrative law judge should not have calculated claimant's average weekly wage under Section 10(a), but rather should have used Section 10(b) or Section 10(c), excluding the Saudi Arabian income. The Decision and Order of the administrative law judge must be affirmed if it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a journeyman electrician in the Washington, D.C. area for eight and a half

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[1] The parties stipulated to claimant's entitlement to temporary total disability benefits from April 9, 1979, the date claimant was injured during the course of his employment with employer, through May 17, 1981, at which time claimant returned to work. Employer voluntarily paid compensation to claimant for the duration of his disability at a rate lower than that sought by claimant.

years. In May, 1978, he learned that a subsidiary company of employer was seeking electricians for work in Saudi Arabia. Claimant subsequently signed a six-month contract providing very lucrative compensation and benefits and performed this contract from June 22, 1978, to December, 1978. After completion of the work, he returned to the United States and resumed his customary work for employer under union scale rates. Although claimant had discussed returning to Saudi Arabia with his wife and family and had begun making preliminary arrangements, he had not yet submitted any job applications for such work before his accident occurred on April 9, 1979.

The administrative law judge concluded that Section 10(a) provided the appropriate calculation of claimant's average weekly wage because claimant was doing essentially the same work, utilizing the same skills, knowledge and experience, in Saudi Arabia as he did in the United States, and he did that work for substantially the whole of the year preceding his injury. He rejected employer's argument that Section 10(a) should not apply because claimant worked for two separate corporate entitites,[2] finding that the nature of claimant's employment is the determinative factor in the application of Section 10(a). The administratie law judge found that claimant's earnings in Saudi Arabia represent an earning capacity he had achieved at the time of injury, and concluded that those earnings should be considered in determining average weekly wage. Based on claimant's actual wages for the entire 52-week period before the injury, the administrative law judge calculated claimant's average weekly wage to be $1,097.54,[3]

[2] This finding is correct because Section 10(a) expressly takes into consideration employment "for the same or another employer." 33 U.S.C. §910(a).

[3] The administrative law judge divided claimant's actual earnings of $53,077.47, by the 279 days actually worked, to arrive at an average

subject to the maximum compensation rate in effect at that time under 33 U.S.C. §906(b), *i.e.*, $396.78. On appeal, employer seeks an award of approximately $312.00, based on two-thirds of the $468.00 average weekly wage which only represents District of Colubmia wages.

Employer contends the administrative law judge should not have applied Section 10(a) and thus used actual wages because he erroneously found that claimant worked in the same employment in which he was working at the time of his injury for substantially the whole year preceding the injury. Employer argues that claimant did not work substantially the whole year in either Saudi Arabia or the District of Columbia, and that the work in Saudi Arabia was of a different nature than that performed in the District of Columbia with regard to the skills utilized, the geographic location, and the benefits received.

Section 10(a) applies:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury.

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daily wage of $190.24. This figure was multiplied by the 300-multiplier for a six-day worker under Section 10(a) and divided by 52 pursuant to Section 10(d).

We reject employer's contention that the administrative law judge failed to give his reasoning for determining that claimant worked 279 days in the year preceding his injury. Ths determination is supported by employer's payroll records and other record evidence.

We do not address employer's contention that the administrative law judge erroneously found claimant to be a six-day worker rather than a five-day worker. Any error by the administrative law judge is harmless because the use of either the five-day or six-day multiplier provided by Section 10(a) results in an average weekly wage which far exceeds the maximum compensation rate under Section 6(b).

33 U.S.C. §910(a). "Substantially the whole of the year" refers to the nature of claimant's employment. *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds,* 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *see Waters v. Farmers Export Co.*, 14 BRBS 102 (1981), *aff'd per curiam,* 710 F.2d 836 (5th Cir. 1983).

The administrative law judge concluded that the skills, knowledge, and experience utilized by claimant in his Saudi Arabia and District of Columbia positions were the same. Employer argues that, unlike his work as a journeyman electrician in the District of Columbia, claimant's job in Saudi Arabia also required that he perform some supervisory and foreman functions. However, claimant testified that the two positions involved the same type of work and that he had been a subforeman and foreman for three to four years for employer. The administrative law judge's determination is therefore based upon substantial evidence.

The administrative law judge also properly rejected employer's argument that the geographic location made a difference. As noted by the administrative law judge, Section 10(b) requires that employment of workers of the same class, upon whose earnings average weekly wage should be based where a claimant has not worked in the same employment for substantially the whole year preceding the injury, be "in the same or neighboring place." 33 U.S.C. §910(b). Section 10(a) contains no comparable locality requirement.

The administrative law judge also discussed the considerble difference in the compensation rates and benefits

of the two jobs and concluded the additional compensation and benefits in Saudi Arabia were just compensation for the sacrifices made by claimant, rather than being compensation for any additional skills and knowledge. This conclusion is reasonable.

Accordingly, the administrative law judge's determination that claimant was employed in the employment he was working at the time of the injury for substantially the whole year preceding his injury is supported by substantial evidence. His use of Section 10(a) to calculate claimant's average weekly wage was therefore proper.[4]

Employer contends, however, that the administrative law judge should have used Section 10(c) to calculate claimant's average weekly wage based on only District of Columbia wage rates because his determination under Section 10(a) does not represent claimant's true wage-earning capacity. We reject this contention.

Section 10(c) applies where the formulas provided in Sections 10(a) and 10(b) "cannot reasonably or fairly be applied." 33 U.S.C. §910(c); *see Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The administrative law judge found claimant's Saudi Arabian earnings represented an earning capacity claimant had achieved since he had shown that he was willing to make the sacrifice of separation from home and family in order to earn higher foreign wages. This finding reflects that the administrative law judge considered the formula provided in Section 10(a) to be a fair and reasonable method of calculating

[4] Since Section 10(b) applies only where the injured employee did not work in such employment for substantially the whole year, 33 U.S.C. §910(b); *see Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacted in part on other grounds*, 713 F.2d 462 (9th Cir. 1983), employer's contention that Section 10(b) should be applied is rejected.

claimant's average weekly wage. This determination is rational and within his discretion as the fact-finder, and precludes consideration of Section 10(c).

The administrative law judge's determination of claimant's average weekly wage under Section10(a) is rational, supported by substantial evidence, and in accordance with law. Accordingly, the Decision and Order awarding benefits is affirmed.

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

/s/ Arthur C. White
ARTHUR C. WHITE
Administrative Law Judge

Dated this 31st
day of March 1986

FILED AS PART
OF THE RECORD
MAR 31 1986
/s/ Linda M. Mrekiew/AH
Clerk of the Board
Benefit Review Board

APPENDIX C

U.S. Departmentof Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
JOHN PAUL MULCARE, JR. Claimant	:	
v.	:	CASE NO. 81-DCWC-76
E.C. ERNST, INC. Employer	:	OWCP NO. 40-136240
and	:	
THE TRAVELERS INSURANCE COMPANY Carrier	:	
and	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party in Interest	:	

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For the Employer/Carrier

DECISION AND ORDER – AWARDING BENEFITS

This matter involves a claim for temporary total disability under the Longshoremen and Harbor Workers' Compensation act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the "Act"), and extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.*

The claim covers the period from April 9, 1979, the time of a stipulated accidental work injury, through May 17, 1981,[1] the time of claimant's return to gainful employment, and the sole issue is the proper determination of claimant's average weekly wage under Section 910 of the Act. Claimant believes it should be calculated under Section 910(a), taking into account a six-month period of employment in a foreign country during which he earned over $50,000, for an average weekly wage of $1,117.90 (maximum compensation rate $396.78). Respondents claim the computation should be under Section 910(b) based strictly upon union scale wages in the District of Columbia at the time of his injury which would result in a substantially lower average weekly wage with a compensation rate of $312.15. The single issue here is whether to apply Section 910(a) or 910(b).

Claimant is a 44-year-old journeyman electrician who has worked for employer for eight and a half years. He has been a journeyman electrician and a local union member for 20 years with work with other contractors as well. On April 7, 1979, he was working at the Blue Plains Sewage Treatment Plant for employer and while attempting to

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[1] The claim was modified by post-hearing letter of claimant's counsel, dated May 19, 1981, from a continuing disability, with the concurrence of opposing counsel. The letter is admitted into evidence as Claimant's Exhibit 5.

bend a piece of a pipe out of a wall he fell backward, fracturing his skull and spine. Claimant received compensation for a temporary total disability from the time of his injury to May 18, 1981 when he returned to gainful employment. The compensation rate utilized by employer for the payment of compensation, and contested here, was solely based on claimant's union scale wages in the District of Columbia, which at the time of injury were $11.70 per hour, or a base rate of $468 per week for the compensation rate of $312.15.

Claimant questions this compensation rate because it does not take into proper account the six-month period of employment between May 31 and December 8, 1978 in Tabuk, Saudi Arabia for a subsidiary company of the employer.

In May, 1978, while working for employer as a journeyman electrician at the Capitol Hill Hospital, claimant learned that electricians were sought for work in Saudi Arabia by the subsidiary company of employer, E.C. Ernst, International (Ernst Int.). Claimant went to the office of employer (also hereinafter, Ernst Inc.) at 2000 L Street, N.W., Washington, D.C., submitted an application with Ernst Int., and later signed a contract for six months of employment commencing June 22, 1978 in Saudi Arabia as an electrician. The contract provided for a base salary of $625 per week, and approximately $500 per month food allowance, a two-week vacation with pay, a 15 percent overseas increment of base salary ($93.75), overtime pay for work on Fridays (a holy day), triple time pay for work on an Arabic holiday (Ramidan), and a ten percent contract completion bonus. The total pay and allowances under this six-month contract exceeded $50,000, considerably more than the total annual income claimed for the years 1972-75 which ranged from $22,517 to $30,258. (Employer's Exh. 14)

On the King Abdul Aziz Military Cantonment project in Tabuk, Saudi Arabia, claimant worked in three capacities, showing native workmen what had to be done: "I worked as an electrician, as a foreman and as a supervisor . . . I dug ditches, operated jack hammers, run pipe, pulled wire." (Tr. 89) Claimant stated he performed the same kind of electrical work he performed in the United States.

Claimant's payroll checks during his work abroad were sent to his wife at his home in the local area, where his family remained. The check envelope had Ernst Int. on it, while the check itself was issued by Ernst Inc., a fact explained according to a corporate officer, by the issuance of payroll checks through the large computer system of the parent corporation as a service paid for by Ernst Int.

After claimant completed his work in Saudi Arabia in December 1978 and returned to the United Staets, he resumed his customary work in the Washington, D.C. area under union scale wages. Although claimant had discussed returning to Saudi Arabia with his wife and family, and considered the necessary arrangements he would have to make, such as school enrollment abroad for his children and maintenance of his house, he had not actually submitted any application for such work again before the instant accident occurred approximately four months after his return.

Claimant's total wages for the year prior to the injury were $53,077.47.[2]

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[2] For the relevant period and based on available data, claimant's wages from May 8, 1978, when he first began work again with Ernst Inc. before the work abroad, to May 30, 1978 was $2,125 (Claimant's Exh. 3); actual base pay received for work with Ernst Int. (pay stubs 6/16-12/1/78) (as a six-day worker) was $17,975.20 (Claimant's Exh. 2); the amount due upon contract termination (12/8/78) for overtime work and the other allowances was $26,797.27 (Employer's Exh. 1); and his earnings when he returned to local employment with Ernst

Another journeyman electrician, Felix Driskill, who worked out of a local union in Norfolk, Virginia, also worked in Saudi Arabia with claimant as a working supervisor. He returned also in December 1978. Applications for work in Saudi Arabia were apparently encouraged from workers who could take their families. Mr. Driskill had started submitting applications in early 1981 and had not yet been offered any further employment abroad.

Ernst Int., as a wholly owned subsidiary of Ernst Inc., performed electrical work solely on overseas contracts while the parent corporation performed solely domestic electrical construction work. The two corporations employed different methods of hiring employees, Ernst Int. hiring workers directly whereas Enrst Inc. hired workers through local unions. Local contracts were therefore subject to varying prevailing rates for different geographic areas, such as in Washington, D.C. and Norfolk, Virginia. Except for the overtime factor, local work and overseas work differed substantially with such features as higher base salary, overseas increment, completion bonus, and rest and recuperation allowances being unique to the latter.

The differences in the terms of employment are the basis for employer's contention that the unique six-month period of employment abroad should not be taken into consideration in determining claimant's average weekly wage for the year preceding his injury. Such work, it is contended, was so exceptional and for such insubstantial length, that the average annual earnings of other electricians employed in the metropolitan area should be considered in this determination under Section 910(b). Claimant's contention, however, that the differences did not

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Inc. (12/9/78) until the approximate time of injury (4/9/79) were $6,180 (Claimant's Exh. 3; Employer's Exh. 5).

change the nature of the work he was performing as an electrician – irrespective of geography – and thus those wages should be considered in calculating his average weekly wage under Section 910(a) is not without validity and support.

Sections 910(a) and 910(b) provide two separate methods for computing average annual earnings, but neither presupposes an absolute equation between average annual earnings and actual earnings for the year preceding an injury. *Hole* v. *Miami Shipyards Corp.*, 12 BRBS 38 (1980). Section 910(a), the applicability of which must be considered first, provides, in pertinent part, that:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

The term "substantially the whole of the year" refers to the *nature* of claimant's employment. *Eleazer* v. *General Dynamics Corp.*, 7 BRBS 75 (1977). The Benefits Review Board has held that a substantial part of the year may be composed of work for two *different* employers where there was substantial evidence to support the conclusion that the skills used in the two jobs were highly comparable. *Hole* v. *Miami Shipyards Corp.*, *supra* at 43. As employer has argued, Section 910(b) provides the method of calculation when the claimant has not worked in the employment in which he was injured "during substantially

the whole of such year" and the wages of an employee, or employees, as the employer has provided (Employer's Exhs. 6-11), of claimant's same class in the same or neighboring area may be the frame of reference.

It clearly appears under the facts of this case that Section 910(a) should be applied. Whether the distinction here between Ernst Inc. and Ernst Int. is so compelling as to treat the latter as a different employer is a question unnecessary to answer because of the nature of the employment – that is, the skills, knowledge, and experience utilized, as *Hole* instructs – is not merely "highly comparable" but unquestionably the same. For Ernst Inc. claimant was essentially a journeyman electrician who had worked as a foreman and subforeman performing what could be generally called electrical construction work. For Ernst Int. claimant was a "working foreman" doing essentially the same work.[3] (Tr. 87, 89) The mere geographic incidence of working, say, in Blue Plains or Tabuk – at home or abroad – adds no more pivotal element to the consideration than working in Washington, D.C. or Norfolk. Claimant's earnings for the year were based on the same kind of employment and the same skills as an electrician.[4]

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[3] It is not believed that the supervisory functions of a "working foreman" went beyond "the normal scope of capabilities required of a journeyman electrician," as respondents contend (Br. 8), as to make more a difference in substance than in mere titles. The employment agreement merely classified claimant's job as "[e]lectrician"; a project manager described it as electrical supervisor. (Claimant's Exhs. 1, 4) In any event, claimant had worked locally as a foreman.

[4] Section 910(b), which respondents argue as applicable, does predicate determination to some extent upon earnings "in the same or neighboring locality" of other workers in the same or most similar employment when claimant shall not have worked for substantially the whole of the year in the employment in which he was working at the time of the injury, but no such geographic or proximity require-

Moreover, it should not redound to claimant's disadvantage that he should have earned in this six-month period abroad an amount far greater than he could have hoped to earn for any comparable period of domestic employment. He made more because he was willing to make the sacrifice – separation from home and family – to do so. That an employer should pay more and provide other inducements for skilled tradesmen such as claimant to work under conditions significantly different from those to which they might have been accustomed is but the consideration for the sacrifice.[5] Claimant's wages – and those benefits traditionally regarded as recompense for service – are, however, not any less considerable here because they happened to have been earned in a different place. Nor is it of much consequence that claimant could not expect in the foreseeable future another opportunity for this exceptional income, despite whatever plans or preparations he might have made, just as it hardly matters that the total monetary benefits from the foreign employment vastly exceeded earnings under a local union wage scale. The test of validity may well be respondents' position if the benefits had been less.

Since earnings from Ernst Inc. here represent actual wages, and an earning capacity he had *acheived* – whatever lack of assurance there might have been of maintaining it, they are properly considered in assessing the wage-

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ment can be read into Section 910(a). Moreover, since the latter refers to employment, "whether for the same or another employer," it carries no apparent distinction based on the regional diversity of the claimant's work.

[5] The sacrifice, as it developed here, went far beyond the hardships of the foreign employment. It included the travail and embroilment in collateral disputes and litigation, as well as the substantial risk of nonpayment of a considerable amount due. (Tr. 35, 76-82; Claimant's Exh. 2 (1/19/79))

earning capacity that has been impaired by injury These earnings derived from the same kind of employment in which claimant was engaged at the time of his injury, and in which he was engaged for the entire year preceding it. Application of Section 910(a) is mandated.

Claimant's average weekly wage is $1,097.54, which is subject to the maximum compensation rate of $396.78 established pursuant to Section 906(b) of the Act.[6]

ORDER

I. Respondents shall pay claimant compensation for a temporary total disability from April 9, 1979 through May 17, 1981, based on an average weekly wage of $1,097.54 and the maximum compensation rate – $396.78. Until paid, compensation payable shall be subject to interest at the rate of six percent per annum from the time each compensation payment became due and the total amount due shall be paid in lump sum.

II. Respondents shall pay to claimant's attorney a reasonable fee for legal services rendered to claimant. (No application from claimant's attorney has been received. An application should be submitted within twenty days from the date of this Decision and Order, with simultaneous service upon opposing counsel, who may express concurrence or objection within ten days thereafter. A reasonable fee will be approved by supplemental order.)

/s/ Julius A. Johnson
JULIUS A. JOHNSON
Administrative Law Judge

Dated: June 2, 1982
Washington, D.C.

[6] Claimant's actual earnings of $53,077.47 and the 279 days actually worked for the 52 weeks prior to injury result in an average daily wage of $190.24. Claimant was a predominantly six-day worker; the 300 multiplier of Section 910(a) produces the amount then divided by 52 under Section 910(d) for the average weekly wage.

APPENDIX D

§ 902. Definitions

When used in this chapter—

* * * * *

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

§ 908. Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disbility: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subsection (b) or subsection (e) of this section, respectively, and shall be paid to the employee, as follows:

> **(21)** Other cases: In all other cases in the class of disability, the compensation shall be 66⅔ per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

§ 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which

he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

APPENDIX E

Petitioner, Travelers Insurance Company, reports, pursuant to Rule 28.1 of the Rules of this Court, that Travelers Insurance Company is a wholly owned subsidiary of The Travelers Corporation. The Travelers Corporation has numerous wholly owned subsidiaries. Affiliate companies not wholly owned include:

Atalfa (UK) –
Terra Nova Insurance Company owns 44%

Blue Ash Associates Limited Partnership -
General Partner is Keystone Realty Partners, Inc.

Dublin Regional Plaza Joint Venture –
General Partners are Travelers Income Properties I (60%) and Travelers Income Propertie II (40%)

Exsure Midwest, Inc. –
Exsure, Inc. owns 99%

KBA 3 Limited Partnership –
General Partner is Keystone Custodian Funds, Inc.

Keystone Blue Ash Limited Partnership –
General Partner is Keystone Custodian Funds, Inc.

Keystone Provident Life Insurance Company –
Keystone Financial Corporation owns wholly except for 9 directors' qualifying shares

La Metropole S.A. –
Adria-TIC International Holding S.A. owns 98.83%

London and Hartford Corporation –
Travelers Asset Management International Corporation owns 50% and Guinness Peat Properties, Inc. owns 50%

Managed Health Care Service, Inc. –
Travelers Corporation owns 25%

Park Place West Limited Partnership –
General Partner is Keystone Realty Partners, Inc.

Terra Nova Insurance Company Limited –
Travelers Corporation owns 17.3% and Atalfa (UK) owns 23.03%

Travelers American Real Estate Company, Ltd. –
Travelers Asset Management International Corporation owns 49% and Sharjah Group Company owns 51%

Travelers Corporation of Asia Limited –
Travelers Corporation owns 92% and companies members of the Malayan Group owns 8%

Travelers Corporation of Bermuda Limited –
Travelers Corporation owns 99.99% and .01% is directors' qualifying shares

Travelers Income Properties - I –
General Partner is Keystone Properties, Inc.

Travelers Income Properties - II –
General Partner is Keystone Properties, Inc.

Travelers Indemnity Company of Canada –
Travcan owns 99.73% and .27% is directors' qualifying shares

Travelers of Ireland Limited –
Travelers Corporation owns 99.9%

Travelers Life Insurance Company of Canada –
Travcan owns 99.73% and .27 is directors' qualifying shares

Travelers Life Insurance Company International Ltd. –
Travelers Corporation owns 99.994166% and .005833 is directors' qualifying shares

Travelers Lloyds Insurance Company –
Underwriter acts as trustee for Travelers Indemnity Company which is entitled to all distribution of profits

Travelers Real Estate Investment Trust 2 –
5 shares issued to Keystone Custodian Funds, Inc.

Travelers Realty/100 L.P. –
General Partner is KPI 85, Inc.

Travelers Realty Income Investors –
11,125 shares issued to Keystone Custodian Funds, Inc. out of 2,261,125

Travelers Reinsurance Company of Bermuda Limited –
Travelers Indemnity Company owns 9.99% and .01% is directors' qualifying shares

Travelers U.S. Property, Bermuda, Ltd. –
Travelers Asset Management International Corporation owns 15% and Clariden Bank owns 85%

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-640

In the Supreme Court of the United States

OCTOBER TERM, 1987

E. C. ERNST, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a claimant worked in the same employment during substantially the whole of the year preceding his work-related injury for purposes of determining the claimant's "average weekly wage," the base for calculating his disability compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. III) 901 *et seq.*

2. Whether particular cash payments to a claimant above his base salary were properly included in calculating his "average weekly wage."

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-640

E. C. ERNST, INC., ET AL. PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported. The decision and order of the Benefits Review Board (Pet. App. 7a-13a) is reported at 18 Ben. Rev. Bd. Serv. (MB) 158. The decision and order of the administrative law judge (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 20, 1987. The petition for a writ of certiorari was filed on October 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The version of the District of Columbia Workmen's Compensation Act (DCWCA) at issue in this case, ch.

612, §§ 1-2, 45 Stat. 600, formerly codified at D.C. Code Ann. §§ 36-501 to 36-502 (1973), extended the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. (& Supp. III) 901 *et seq.*, to all employees in the District of Columbia for work-related injuries occurring on or before July 26, 1982.[1] The LHWCA provides injured workers with guaranteed workers' compensation for work-related injuries.[2]

Disability benefits payable to an injured employee under the LHWCA and the DCWCA are based upon an employee's "average weekly wage." Thus, compensation for temporary total disability is set at "66⅔ per centum of the [employee's] average weekly wages." 33 U.S.C. 908(b). An employee's "average weekly wage" is computed according to one of three alternative methods. "If the injured employee * * * worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury," Section 10(a) of the Act provides that the employee's average weekly wage is based upon his actual earnings during the previous year.

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[1] The District of Columbia has since enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1987), pursuant to "home rule" authority granted to the District by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774. The new law became effective on July 26, 1982, for injuries occurring after that date; employers continue to be liable under the earlier DCWCA for injuries that occurred prior to that date. See 20 C.F.R. 701.101(b).

[2] The LHWCA was amended in 1984 by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (& Supp. III) 901 *et seq.*). The provisions of the unamended version of the LHWCA continue to apply to claims arising out of injuries that occurred before the effective date of the 1982 District of Columbia law referred to above (note 1). *Keener* v. *Washington Metro. Area Transit Auth.*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987).

33 U.S.C. 910(a).[3] In contrast, the average weekly wage of an employee who has not worked in the same employment for substantially the whole of the year preceding the injury is, under Section 10(b), derived by looking to the wages of employees "of the same class" who worked for substantially the whole year preceding the injury in the same or similar employment in the same or a neighboring place. 33 U.S.C. 910(b). Finally, where neither Section 10(a) nor 10(b) can "reasonably and fairly be applied," Section 10(c) provides that the average weekly wage will be derived from "the annual earning capacity of the" individual, taking into account such considerations as the individual's previous earnings in the employment in which he was injured, the earnings of other employees engaged in similar work in the locality, and other employment of the individual. 33 U.S.C. 910(c).

2. Petitioner E.C. Ernst, Inc. (Ernst), is an electrical contractor incorporated under the laws of the District of Columbia (Pet. 3). Petitioner Travelers Insurance Co. is Ernst's worker's compensation liability carrier (*ibid.*). Respondent John Paul Mulcare, Jr., fell and was injured on April 7, 1979, while working in the District of Columbia as an electrician in the employ of Ernst. Mulcare was temporarily totally disabled as the result of his injuries (Pet. App. 15a-16a).

During the year before his injury, Mulcare had been employed by Ernst between May 1978 and June 22, 1978, and between December 1978 and April 1979. While employed by Ernst, Mulcare received union scale wages, which at the time of his injury were $11.70 per hour, or a base rate of $468 per 40-hour week (Pet. App. 16a).

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[3] Section 10(a), like Section 10(b) and (c), 33 U.S.C. 910(b) and (c), provides for the calculation of "average annual earnings." This figure becomes the "average weekly wage" when divided by 52, as set forth in 33 U.S.C. (Supp. III) 910(d).

Between June 22, 1978, and December 1978, Mulcare had been employed as an electrician in Saudi Arabia pursuant to a six-month contract with E.C. Ernst, International (Ernst, International), a wholly owned subsidiary of Ernst (*id.* at 16a, 18a). Under the terms of his employment contract with Ernst, International, Mulcare was paid a base salary of $625 per week, a food allowance of approximately $500 per month, a 15% overseas increment, a 10% contract completion bonus, and other benefits (including overtime for work on Fridays and during the Ramidan holiday, and a two-week vacation with pay) (*ibid.*).

3. a. After Mulcare's injury, petitioners began paying him compensation benefits for his temporary total disability, calculated pursuant to Section 10(b) of the Act and based on the union scale wages earned by journeyman electricians in the Washington, D.C., area, during the year before Mulcare's injury (Pet. App. 16a). Mulcare then filed this claim challenging the compensation rate, asserting that, because he had worked at the same type of employment throughout the year preceding his injury, his "average weekly wage" should be determined by reference to Section 10(a) and, thus, should be based on his actual wages during the year preceding his injury, including the wages he received for work in Saudi Arabia (Pet. App. 15a).

The administrative law judge (ALJ) found that "the nature of [Mulcare's] employment [in Saudi Arabia and the District of Columbia]—that is, the skills, knowledge and experience utilized * * *—[was] not merely 'highly comparable' but unquestionably the same" (Pet. App. 20a). The ALJ based this finding upon Mulcare's testimony that while employed at Ernst he "was essentially a journeyman electrician who had worked as a foreman and subforeman performing * * * electrical construction work," whereas "[f]or Ernst Int. [he] was a 'working foreman' doing essentially the same work" (*ibid.*). The

ALJ also found that Mulcare's wages and benefits from Ernst, International, represented an earning capacity that he "had achieved" based upon sacrifices he had made while working in Saudi Arabia, and that were derived from the same employment in which he was working at the time of injury. Because the ALJ accordingly found that Mulcare had been working in the same employment for substantially the whole year preceding the accident, he concluded that Mulcare's disability compensation should, pursuant to Section 10(a) of the Act, be based upon his actual wages during that year (Pet. App. 21a-22a).[4]

b. The Benefits Review Board affirmed, holding that the ALJ's determination of Mulcare's average weekly wage under Section 10(a) was supported by substantial evidence that Mulcare's skills, knowledge, and experience in his Saudi Arabia and District of Columbia positions were the same (Pet. App. 8a, 11a). The Board rejected petitioners' argument that the difference in geographic location between the District of Columbia and Saudia Arabia jobs established that they were dissimilar, noting that Section 10(a), unlike Section 10(b), contains "no locality requirement" (*ibid.*).

The Board also found reasonable the ALJ's finding that the additional compensation received by Mulcare in Saudi Arabia had been compensation for sacrifices arising out of foreign employment (Pet. App. 12a). The Board therefore rejected petitioners' argument that Section 10(a) could not "reasonably or fairly be applied" in this instance, and that the average weekly wages should therefore be determined under Section 10(c) (Pet. App. 12a-13a).

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[4] Wages calculated at union scale produced an average weekly wage of $468 per week, yielding a compensation rate of $312.15 per week (Pet. App. 15a). Under Section 10(a), Mulcare's average weekly wage was $1,097.54, yielding a compensation rate at the statutory maximum of $396.78 per week (Pet. App. 22a).

c. The court of appeals affirmed in an unpublished order and opinion (Pet. App. 1a-6a). The court agreed that substantial evidence supported the finding that Mulcare's employment "did not change materially" during the year preceding his injury (*id.* at 4a). The court also found substantial evidence supporting the finding that the extra pay received by Mulcare in Saudi Arabia "compensate[d] [him] for the hardship and inconvenience of working" in a foreign location, and had not been paid "because [the employment] required additional skills or training" (*id.* at 5a). And the court rejected petitioners' arguments that because Mulcare worked for a different employer and outside the country during the relevant period, use of Section 10(a)'s method was an inappropriate formula for determining his average weekly wage (Pet. App. 4a).

The court of appeals also held that the payments Mulcare received from Ernst, International, above his $650 weekly base salary were "wages" under this Court's decision in *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624 (1983), rather than "fringe benefits" that should be excluded in determining a wage rate under the LHWCA. The court concluded that these additional payments constituted wages because they were paid directly to Mulcare as consideration for work he performed and represented " 'real economic gain' " to him. Pet. App. 5a-6a (quoting 2 A. Larson, *Larson's Workmen's Compensation Law* § 60.12(a) (1986)).

ARGUMENT

The court of appeals' unpublished decision is correct and does not conflict with any decision of this Court or another court of appeals. Review of petitioners' contentions – which primarily involve challenges to factual findings made by the ALJ and affirmed by the Benefits Review

Board and the court of appeals—is therefore not warranted.[5]

1. The administrative law judge found that Mulcare's employment in Saudi Arabia and the District of Columbia had been "unquestionably the same" (Pet. App. 20a). The Benefits Review Board and the court of appeals concluded that this finding was supported by substantial evidence. In contending (see Pet. 10-11) that Mulcare's employment in Saudi Arabia was not the same as his employment in the District of Columbia, petitioners are essentially challenging this factual determination. It is clear, however, that Mulcare's testimony regarding his duties in the two jobs (Pet. App. 17a) provides substantial evidence supporting the ALJ's finding, and petitioners' attack on that finding plainly does not warrant this Court's attention.[6]

Petitioners also erroneously assert (Pet. 16-19) the existence of a conflict among the circuits by pointing to court of appeals' decisions applying formulas other than that specified in Section 10(a). In those cases, however, Section 10(a) was not the appropriate measure of wages because the claimants' employment was discontinuous, intermittent or seasonal in character, or of too short a dura-

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[5] We note that, even if the unpublished order below could be said to have settled the meaning of the DCWCA, that decision would have no continuing effect. The enactment of a new workers' compensation law in the District of Columbia (see note 1, *supra)* changed the formula on which a claimant's average weekly wage is computed. See D.C. Code Ann. § 36-311 (1981 & Supp. 1987) ("weekly wage" computed on the basis of wages at the time of injury).

[6] Petitioners assert (Pet. 11), without any supporting authority, that employment outside the United States cannot be the same as Mulcare's domestic employment for purposes of Section 10(a). As the court of appeals recognized (Pet. App. 4a-5a), this contention is inconsistent with the plain language of the statute. In contrast to Section 10(b), which refers to wages of employees doing similar work "in the same or a neighboring place," Section 10(a) contains no requirement that a claimant's work in the same employment be performed in one location.

tion to cover "substantially the whole of the year immediately preceding his injury." See *Tri-State Terminals, Inc.* v. *Jesse*, 596 F.2d 752, 753 (7th Cir. 1979) (Section 10(c) applies where work discontinuous and intermittent); *Johnson* v. *Britton*, 290 F.2d 355, 357 (D.C. Cir. 1961) (claimant worked 180 days in year, a "typical year in the construction industry"); *O'Hearne* v. *Maryland Casualty Co.*, 177 F.2d 979, 980 (4th Cir. 1949) (Section 10(b) was applied because, although the employment itself was continuous, claimant had commenced working in that employment only two days before his injury); *Marshall* v. *Andrew F. Mahony Co.*, 56 F.2d 74, 77 (9th Cir. 1932) (Section 10(a) applies where work continuous). See S. Rep. 1315, 80th Cong., 2d Sess. 6 (1948) ("[S]ubsection (c) applies to seasonal, intermittent, discontinuous, and like employment which affords less than a full workyear or workweek.").[7] Here, in contrast, the ALJ explicitly found that Mulcare worked in the same employment throughout the year preceding his injury—findings that make it clear that Mulcare's employment was continuous and full time. See Pet. App. 22a n.6. The decisions cited by petitioners are therefore inapposite.[8]

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[7] *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 698 F.2d 743 (5th Cir. 1983), said by petitioners to be in conflict with the decision below (Pet. 16), was vacated by the en banc Fifth Circuit. 723 F.2d 399, cert. denied, 469 U.S. 818 (1984). In any event, even the panel decision in that case did not conflict with the holding of the court of appeals here. The panel in *Newpark Shipbuilding* affirmed an administrative law judge's findings that there "had [been] a complete change * * * of * * * employment" when the claimant abandoned his work as an independent contractor to become an hourly paid welder. 698 F.2d at 749.

[8] Petitioners' contention that the ruling below is "shockingly inequitable" because it does not "fairly reflect[] [Mulcare's] earning capacity" is without merit (Pet. 10). The Benefits Review Board noted that Mulcare had begun making preliminary arrangements for returning

2. There is no merit in petitioners' challenge (Pet. 20-27) to the court of appeals' ruling that payments to Mulcare in excess of his weekly base rate were properly considered by the ALJ in calculating Mulcare's average weekly wage. Petitioner asserts that this ruling conflicts with this Court's decision in *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624 (1983). In *Morrison-Knudsen*, however, this Court held only that employer contributions to union trust funds for health and welfare, pension, and training programs should not be deemed "wages" for purposes of computing compensation benefits under Section 2(13) of the LHWCA, 33 U.S.C. 902(13),[9] because the present value of such contributions cannot easily be converted to a cash equivalent and because the interest of employees in such contributions are "speculative" (461 U.S. at 630-631). At the same time, the Court recognized that "benefits with a present value that can be readily converted into a cash equivalent on the basis of their market values" are appropriately deemed wages (*id.* at 630). As the court below held (Pet. App. 5a-6a), the challenged payments here (an overseas adjustment, completion

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to Saudi Arabia, although he had not yet applied for jobs in that country at the time of his injury (Pet. App. 9a). Thus, the court of appeals correctly concluded that, "[b]ecause of Mulcare's actual work history during the year preceding his injury, as well as his employment intentions for the future, the section 10(a) formula can be reasonably applied to determine the rate of compensation to which he is entitled" (*id.* at 5a). In any event, petitioners' allegations of inequity are exaggerated. The statutory cap on compensation diminished the effect of Mulcare's Saudi Arabian wages on his benefits under the Act by more than $300 per week. As a result, inclusion of those wages increased his compensation under the DCWCA by less than $85 per week. See Pet. App. 15a.

[9] The 1984 amendment to Section 2(13) of the LHWCA codifies the holding in *Morrison-Knudsen*. Pub. L. No. 98-426, § 2(c), 98 Stat. 1639. See note 2, *supra*.

bonus, food allowance, payments for unused vacation time, and overtime for Saudi Arabian holidays) plainly were wages under that test: they were paid out directly to Mulcare and constituted a real economic gain to him that was provided as consideration for his services. The payments accordingly were properly included in determining his average weekly wage.

In any event, no other court of appeals has differed with the interpretation of *Morrison-Knudsen* offered by the court below. And, as petitioners acknowledge (Pet. 23), this issue is "of no consequence" in determining Mulcare's temporary total disability payment, the only payment to which he is currently entitled: Mulcare would receive the statutory maximum in compensation (see 33 U.S.C. 906) whether or not the challenged items are included in the average weekly wage. Review therefore is plainly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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